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Nos. 85-1219, 85-1236, 85-1237, 85-1250 and 85-1252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TRANSWESTERN PIPELINE COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF CONSUMERS POWER COMPANY, *ET AL.*, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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BRIEF OF CONSUMERS POWER COMPANY, *ET AL.*, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

INTRODUCTION

Respondents Consumers Power Company, Michigan Consolidated Gas Company, Natural Gas Pipeline Company of America, the Peoples Gas Light and Coke Company, American Iron and Steel Institute, Process Gas Consumers Group, Kansas Corporation Commission, Inter-City Gas Corporation, Michigan Gas Utilities Company, State of Michigan, Michigan Public Service Commission, Public Utilities Commission of the State of

California, Chattanooga Gas Company, a Division of Jupiter Industries, Inc., Columbia Gas Transmission Corporation, Consolidated Gas Transmission Corporation, Brooklyn Union Gas Company, and Public Service Commission of the State of New York file this brief in opposition to the petitions for certiorari in the above-captioned cases.[1]

STATEMENT OF THE CASE

This case involves orders issued by the Federal Energy Regulatory Commission (FERC or Commission), after extensive rulemaking proceedings, pursuant to provisions of the Natural Gas Act, 15 U.S.C. §§ 717-717w (1982). The orders (the Order No. 380 series) prohibited interstate natural gas pipelines from imposing either (a) "minimum commodity bills" that require customers to pay for "variable costs" [2] with respect to minimum volumes of gas they do not actually purchase, or (b) "minimum take" provisions that require the purchase and receipt of specified volumes of gas.[3] Five natural gas pipeline companies have filed petitions for certiorari, seeking review of the unanimous decision of the United States Court of Appeals for the District of Columbia Circuit (Judges Tamm, Mikva, and Starr) that upheld those orders in all pertinent respects. The Court of Appeals also denied rehearing and rehearing en banc, with no member of the court requesting a vote for an en banc hearing.

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[1] A list of these respondents' parents, affiliates, and subsidiaries that are not wholly-owned is attached as an appendix to this brief.

References in the form "A.——" are to the Appendix to the Petition for a Writ of Certiorari filed by Transwestern Pipeline Company in No. 85-1219.

[2] These "costs" typically included payment of the pipeline's purchase price of gas, even if it was not acquired by the pipeline and delivered through the pipeline's system.

[3] The respondents have addressed in this brief only minimum bill, rather than minimum take, provisions.

The orders at issue represent an exercise of the FERC's authority and responsibility to conform its policies to new legislation and the shifting requirements of the public interest. In its initial notice of proposed rulemaking, the FERC noted a number of developments since the enactment in 1978 of the Natural Gas Policy Act (NGPA), 15 U.S.C. §§ 3301-3432 (1982), that changed the role and significance of minimum bills and demonstrated the need for a comprehensive reevaluation of those provisions. (A-79 to A-81.) The NGPA represented a fundamental departure from the previous statutory scheme governing prices paid for natural gas at the point of its production, i.e., at the wellhead. It established "a new system of natural gas pricing . . . needed to balance supply and demand." *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi*, 106 S. Ct. 709, 716 (1986). Under this regime, which calls for gradual deregulation of the wellhead prices for some categories of gas, "[t]he new federal role is to 'overse[e] a national market price regulatory scheme.'" *Id.* (citation omitted).

The FERC noted that the effectiveness of the NGPA's new market-based scheme of gas pricing was being significantly impeded by the presence of minimum bill provisions, which effectively compelled customers to purchase or pay for a predetermined volume of gas from a particular supplier, without regard to the price of or need for that gas. The FERC found that the economic roles of supply, demand, and price were undermined when a customer's purchases from a pipeline were dictated by a factor unrelated to the need for the gas or the availability of alternate supplies at a more favorable price. The FERC (without reference to antitrust law or analysis) characterized this feature of minimum bills as potentially anticompetitive and found the recovery of gas purchase costs (as well as other variable costs) through minimum bill provisions to be unjust and un-

reasonable and thus contrary to the requirements of the Natural Gas Act. (A-82 to A-85.)

The FERC also noted that the overall supply and demand characteristics of the industry had changed significantly since the passage of the NGPA. The NGPA permitted producers to charge higher, "incentive" prices for gas at the wellhead, and in response to these higher prices significant incremental supplies of gas became available. Roughly coincident with this increase of supply, a series of factors—conservation, a decline in worldwide petroleum prices, and the economic recession of the early 1980s—dramatically reduced the nationwide demand for gas. These countervailing trends—increasing natural gas supplies and diminishing demand for gas—left many pipeline customers without adequate markets for the gas they were required to purchase or pay for under their minimum bills. Under such circumstances, a pipeline that received payment for gas not purchased could "recover" costs that it did not incur and obtain windfall profits.[4] The Commission found that minimum bills operating in this fashion are unjust and unreasonable. (A-82 to A-85.)

Although many parties in the rulemaking had urged the total elimination of minimum bills, the FERC limited its orders to preclude only the recovery of variable costs through minimum bills. The Commission declined in the rulemaking to prohibit the recovery of fixed costs by pipelines through minimum bill provisions or customer demand charges.[5] Fixed costs are, by regulatory

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[4] Consumers Power Company, for example, estimated that it would have faced $250 million of minimum bill penalties to Trunkline Gas Company in the absence of a short-term settlement of a litigated proceeding before the FERC in 1983. (A-82.)

[5] For a description of the manner in which demand charges and commodity charges are structured under a typical two-part rate for pipeline sales service, see A-71 to A-73.

definition, those costs incurred by a pipeline whether it purchases and sells gas or not.

Noting the limited nature of its action, the Commission rejected the argument that the prohibition of variable-cost minimum bills amounted to a "restructuring" of the gas industry because it would relieve customers of the obligation to purchase gas without relieving pipelines of the obligation to provide service upon demand. The FERC observed that this argument overlooks that Order No. 380 permits a pipeline to continue to recover fixed costs through the operation of demand charges, which customers pay "whether or not they buy gas." (A-93.)

The Commission specifically addressed concerns about so-called "take-or-pay" provisions in pipeline-producer contracts under which pipelines undertake to prepay producers for a minimum quantity of gas over a specified period. To the extent that such prepayments are not satisfied by the pipeline's ultimate receipt of the prepaid gas, they may generate costs. The Commission noted that a pipeline may seek to recover such costs from its customers, if the pipeline in fact incurs them (A-77 to A-78), and Order No. 380 permits pipelines to continue to recover any such take-or-pay costs that are prudently incurred. The Commission also explained that the difficult issues pertinent to the distribution of prepayment costs among a pipeline's customers would be addressed in individual pipeline rate cases. (A-102 to A-107.)

The FERC's orders have had an immediate, concrete, and beneficial impact on the millions of consumers of gas nationwide, by precluding natural gas pipeline companies from charging their customers for gas that they did not purchase and costs that the pipelines did not incur. Order No. 380 has saved consumers millions of dollars, as the rulemaking record compiled before the FERC demonstrated it would. The Commission's actions

were essential to the administration of the Natural Gas Act, the purpose of which is "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 388 (1959).

ARGUMENT

The petitions for writs of certiorari raise a multitude of issues. However, there is no conflict among the circuits with respect to any of the issues raised, and none of the issues is of sufficient importance to warrant this Court's review.

1. Petitioners contend that the Commission's orders endanger pipeline recovery of fixed costs and threaten to shift those costs to full requirements customers. The Commission specifically addressed these issues. The rule permits continued recovery of fixed costs through a minimum bill. Furthermore, customers remain obligated to pay all the fixed costs assigned to the demand and commodity components of a pipeline's rate. The Commission's action, therefore, protects full requirements customers and pipelines from bearing the cost of facilities constructed for customers that reduce their purchases below minimum bill levels.

2. There is also no basis for petitioners' claim that it was unreasonable for the Commission to decline to eliminate take-or-pay provisions in producer-pipeline contracts at the same time it eliminated variable-cost minimum bills. Petitioners argue that the two types of provisions are inextricably linked. They assert that, without the requirement to pay for variable costs in minimum bills, partial requirements customers will be able to switch more easily from their traditional pipeline suppliers to lower-cost pipelines, and the traditional suppliers will then be unable to meet their take-or-pay obligations.

The Commission gave considerable attention to this issue and concluded that "there is no clear nexus between a pipeline's annual take-or-pay obligations and its minimum commodity bills to its customers." (A-103.)[6] Reductions in purchases by any specific customer or group of customers will not necessarily result in increased pipeline take-or-pay liabilities to producers. For example, purchases by other customers may more than compensate for reductions in sales by partial requirements customers. In addition, most take-or-pay contracts contain make-up provisions that allow the pipeline to credit its take-or-pay payments against subsequent gas purchases that exceed take-or-pay levels, and make-up gas should be paid for by the customers that actually buy it and not by other customers that earlier reduced their purchases. (A-102 to A-105.) In any event, to the extent a pipeline incurs any take-or-pay costs,[7] the Commission's orders do not, as petitioners suggest, obligate full requirements customers to bear such costs, even in the short term. The rule leaves the allocation of any take-or-pay costs that are actually incurred for decision in the individual rate proceedings in which pipelines seek recovery of such costs. In those proceedings, the Com-

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[6] The Commission in any event was not legally required to resolve issues involving producer take-or-pay contracts at the same time it issued Order Nos. 380 and 380-A. As the court below found, "[a]n agency should not be paralyzed by having to decide all relevant issues at the same time. The agency's decision should be upheld unless the agency 'abuse[s] this flexibility by failing to consider . . . an issue whose resolution might seriously undercut the . . . rationale for its final action' . . . ." *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144, 1159 (D.C. Cir. 1985) (citations omitted).

[7] The Commission acknowledged that initially there might be some cost shifting or take-or-pay cost increases on systems that lose partial requirements customers to other suppliers. It explained, however, that such shifts would be short-term and that all pipeline customers would benefit in the long term "as the industry moves towards a competitive balance." (A-99.)

mission can allocate such costs in a variety of ways. If the costs were not prudently incurred, the pipeline must bear them. If there is no finding of imprudence, the Commission could allocate costs to those customers that reduced their purchases, to those that switched to other suppliers, or to all customers. The Commission will also be free to develop other just bases for assigning such costs.

3. In their petition, Trunkline Gas Company and Panhandle Eastern Pipe Line Company have raised for the first time an argument that the Commission's orders conflict with the principles of the Natural Gas Policy Act (NGPA), by subjecting producer prices to market pressures (rather than only encouraging those prices to rise) and by interfering with the statutory mechanism for the pass-through of those prices. They did not raise this argument in the Court of Appeals at all and referred to it only fleetingly in their petition for rehearing before the Commission. Contrary to their arguments, the NGPA clearly contemplates that producer prices should be subject to market forces. *Transcontinental Gas Pipeline Corp. v. State Oil & Gas Board of Mississippi*, 106 S. Ct. 709, 716 (1986) (citing Sen. Rep. No. 95-436, at 10 (1977) ("new federal role is to 'oversee[e] a national price regulatory scheme' ")).[8]

4. There is no merit to petitioners' challenges to the rulemaking procedures that the Commission used in this

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[8] They also argue, more generally, that the Commission's orders promote head-to-head competition, in violation of principles of public utility regulation. However, the FERC's orders do not imperil recovery of fixed costs and thus retain significant protections from the allegedly adverse effects of competition. Moreover, the Natural Gas Act was not intended to prevent all competition among pipelines. Section 7 of the Act, by its terms, provides that the grant of a certificate does not confer a monopoly. 15 U.S.C. § 717f (1982). *See Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 959-61 (D.C. Cir. 1968).

case. Order No. 380 was issued pursuant to Section 5 of the Natural Gas Act, which authorizes the FERC to act "after a hearing." 15 U.S.C. § 717d (1982). This Court has held that informal rulemaking procedures may satisfy the requirement of a ratemaking hearing, *United States v. Florida East Coast Railway*, 410 U.S. 224, 241-42 (1973), and has consistently affirmed the authority of the FERC to establish rates on a nationwide basis through the use of informal rulemaking procedures. *FPC v. Texaco, Inc.*, 377 U.S. 33, 39-45 (1964); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

In the Department of Energy Organization Act of 1977, Congress expressly sanctioned the FERC's use of informal rulemaking procedures for any ratemaking function set forth in the Natural Gas Act. 42 U.S.C. § 7173(c) (1982). Pursuant to that provision, the FERC need only "assure full consideration of the issues and an opportunity for interested persons to present their views." The proceeding leading to Order No. 380 comprised two rounds of written comments by interested parties. Ninety-five parties filed initial comments by September 29, 1983. On January 25, 1984, the Commission invited interested parties to file reply comments by February 13, 1984; thirty parties filed such comments. The Commission issued Order No. 380 on May 25, 1984. The FERC issued Order No. 380-A on July 30, 1984, in response to requests for rehearing, stay, or clarification filed by twenty-five parties.

No party demonstrated to the Court of Appeals that it had not been afforded full opportunity to present its views. The FERC and the Court of Appeals applied proper procedural standards, and there is no reason for this Court to review those standards. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

The enormity of the problem facing pipeline customers and consumers had been made abundantly clear to the Commission by the time it issued the orders involved here. Distributors, consumer groups, and pipelines that bought gas from other pipelines had repeatedly challenged minimum bills, beginning in 1981. In all, twenty-four proceedings before the Commission had raised a minimum bill issue. Virtually every pipeline using minimum commodity bills was challenged. It was appropriate—indeed necessary—for the Commission finally to address and resolve this industry-wide problem on an industry-wide basis.

5. Petitioner ANR Pipeline Company (ANR) contends that the Court of Appeals' ruling upheld the authority of the FERC to abrogate the terms of settlement agreements that it has previously approved. The Court of Appeals, however, made no such ruling. As ANR itself notes in its Petition for Certiorari at 15, the Court of Appeals merely determined that the terms of the particular settlement agreement cited by ANR did not preclude the FERC from applying Order No. 380 to ANR. This narrow issue does not warrant review by this Court.

CONCLUSION

For the reasons stated, the petitions for a writ of certiorari should be denied.

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March 28, 1986

APPENDIX

APPENDIX

LIST OF RESPONDENTS' PARENTS, AFFILIATES, AND SUBSIDIARIES THAT ARE NOT WHOLLY-OWNED

Columbia Gas Transmission Corporation

Big Marsh Oil Company
Columbia Coal Gasification Corporation
Columbia Gas Development of Canada Ltd.
Columbia Gas Development Corporation
Columbia Gas of Kentucky, Inc.
Columbia Gas of Maryland, Inc.
Columbia Gas of New York, Inc.
Columbia Gas of Ohio, Inc.
Columbia Gas of Pennsylvania, Inc.
Columbia Gas of Virginia, Inc.
Columbia Gas System Service Corporation
Columbia Gulf Transmission Corporation
Columbia Hydrocarbon Corporation
Columbia LNG Corporation
Columbia Natural Resources, Inc.
Commonwealth Gas Pipeline Corporation
Commonwealth Gas Services, Inc.
Commonwealth Propane, Inc.
Inland Gas Company, Inc.
TriStar Gas Marketing, Inc. (pending SEC approval)

Consolidated Gas Transmission Corporation

Consolidated Natural Gas Company
The East Ohio Gas Company
The Peoples Natural Gas Company
Hope Gas, Inc.
CNG Producing Company
CNG Development Company
Consolidated System LNG Company
CNG Coal Company
CNG Research Company
West Ohio Gas Company

River Gas Company
CNG Energy Company
Consolidated Natural Gas Service Company, Inc.

Inter-City Gas Corporation

EKW Appliances, Inc.
Greater Winnipeg Gas Corporation
ICG Scotia Gas Ltd.
Keeprite, Inc.
Roam Communications Limited
The Mortgage Insurance Company of Canada
Vancouver Island Gas Company

Michigan Consolidated Gas Company

Primark Corporation

Michigan Gas Utilities Company

Michigan Energy Resources Company

Natural Gas Pipeline Company of America

Natural Gas Pipeline Company of America is a subsidiary of MidCon Corp., a majority of whose shares are owned by Occidental Petroleum Corporation.

MidCon Corp. is the parent of the following subsidiaries:

Alabama Gulf South Pipeline Company, Inc.
Alabama Methane Production Company
Anthrust, Inc.
Cotton Petroleum Corporation
Exeter Capital Corporation
Exeter Drilling Company
Exeter Exploration Company
Exeter Service Company
Gulf South Pipeline Company
Harper Oil Company
Lynx Drilling Company

MCN Acadian Gas Pipeline Corp.
MCN Bayou Interstate Pipeline Corp.
MCN Calcasieu Gas Gathering Corp.
MCN Coal Gasification Company
MCN Equities, Inc.
MCN Louisiana Industrial Gas
MCN Overseas Inc.
MCN Pelican Interstate Gas Corp.
MCN Pelican Transmission Corp.
MCN Pontchartrain Natural Gas Corp.
MCN Research, Inc.
MCN Spindletop Gas Distribution Corp.
MCN Technologies, Inc.
MCN Transmission, Inc.
MCN Utah Pipeline Corp.
MCN-TEX Corp.
MCN-Trinidad and Tobago LNG Company
MidCon Arkansas Pipeline Corp.
MidCon Colorado Pipeline Corp.
MidCon Acquisition Corp.
MidCon Enterprises, Inc.
MidCon Exploration Company
MidCon Gas Products, Inc.
MidCon General, Inc.
MidCon Holding Corp.
MidCon Hydrocarbons Corp.
MidCon Illinois Pipeline Corp.
MidCon International N.V.
MidCon Louisiana Pipeline Corp.
MidCon Michigan Pipeline Corp.
MidCon Mississippi Natural Gas Pipeline Corp.
MidCon Missouri Pipeline Corp.
MidCon Nebraska Pipeline Corp
MidCon New Mexico Pipeline Corp.
MidCon Oklahoma Natural Gas Pipeline Corp.
MidCon Plants, Inc.
MidCon Razorback Pipeline Corp.
MidCon Sales Inc.

MidCon Texas Pipeline Corp.
MidCon Ventures, Inc.
MidCon Wyoming Pipeline Corp.
MidOk Pipeline Company
MidTex Pipeline Company
Mississippi Gulf South Transmission Company
Mississippi River Transmission Corporation
NAERCO, Inc.
NGP-LNG, Inc.
Petrounited, Inc.
South Gulf Management, Inc.
TPC Pipeline Company
Texas Gulf South Pipeline Company
Texoma Production Company
Troy Potter Inc.
UER Gas Trading, Inc.
UER Marketing Company
UER Overseas Finance, N.V.
UER Services, Inc.
United Energy Resources, Inc.
United Energy Services Company
United Gas Pipe Line Company
United Texas Transmission Company
Western Energy Transport Company

The Peoples Gas Light and Coke Company

People's Energy Corporation

Process Gas Consumers Group

American Standard, Inc.
Armco, Inc.
Bethlehem Steel Corporation
Carpenter Technology Corporation
Cone Mills Corporation
Corning Glass Works
General Motors Corporation
Owens-Corning Fiberglas Corporation
Owens-Illinois, Inc.